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Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: WCB Docket Nos. 04-313, 01-338

Dear Ms. Dortch:

The purpose of this letter is to further respond to certain claims in the so-called UNE “Fact” Report relied upon by the RBOCs in their comments and recent *ex parte* filings in the above-referenced proceedings. In the Report, the RBOCs have compiled data purportedly supporting their assertion that unbundling obligations should be drastically reduced or eliminated. As ALTS has shown in its comments and reply comments, elimination of UNE access in many cases would mean the reduction, or elimination, of wireline competition. The Commission must ensure that intramodal wireline facilities-based competition continues to grow, and must recognize that wireline competitors need access to ILEC unbundled network elements (UNEs) in order to thrive.

I. Access to ILEC DS1 and DS3 loop and transport UNEs Is Still Imperative For Intramodal Wireline Competition To Thrive.

A. Limited CLEC long-haul fiber deployment does not demonstrate that wholesale alternatives to UNE DS1 and DS3 loops and transport facilities are available.

In the UNE “Fact” Report, the Bell companies make numerous unsubstantiated claims regarding the availability of alternatives to loop and transport UNEs. The RBOCs claim, for example, that the mere existence of a CLEC fiber ring is enough to eliminate the need for fiber loops and transport in that area.¹ The record makes clear, however, that the cost of extending that fiber ring to a particular customer or building represent the

¹ *Id.* at III-16 (“A fiber-optic network can certainly be used to offer competitive high-capacity services to all customers situated along its path. Overall, the cost of extending a network to reach an off-net building keeps falling.”)

highest portion of deployment costs. The UNE “Fact” Report greatly exaggerates the evidentiary value of limited fiber deployment by CLECs. Indeed, rather than conduct an actual analysis of CLEC facility availability, the “Fact” Report relies almost entirely on marketing statements from CLEC web sites. Using those web sites, the UNE “Fact” Report makes the unsupported conclusion that CLEC last mile facilities are widely available. The opposite is true.

The “Fact” Report quotes marketing materials from several ALTS members, drawing the conclusion that advertisements from CLECs of retail services that require last mile connectivity demonstrate that CLECs themselves have deployed their own last mile facilities.² For example, the Report cites ALTS member company Choice One’s web site, which advertises the availability of Choice One’s Metro Private Line service, a point-to-point service offered between Choice One collocation sites. At the outset, it is important to note that Choice One does not currently have a single customer for this service, thus eliminating its probative value as evidence of UNE alternatives. More importantly, this product is relatively new to Choice One, and is built by a combination of Choice One’s own facilities and incumbent LEC network elements purchased as UNEs by Choice One. Put another way, Choice One would provision this service to a customer by purchasing and reselling ILEC facilities, in combination with Choice One’s own fiber facilities where they are available. Wherever Choice One sells Metro Private Line service, it must rely on the incumbent for the UNE loop to the end user’s premises. Thus, despite the fact that the UNE “Fact” Report cites Choice One as evidence that wholesale loop and transport providers are available as alternatives to UNEs, Choice One in fact uses ILEC UNEs as an integral component of the very service cited as a UNE alternative. Not only does Choice One provide no alternative to DS1 and DS3 loops, contrary to the ILECs’ argument, but ironically, in the absence of such UNEs, Choice One would have no Metro Private Line service to offer.

Moreover, even where CLECs have deployed fiber rings in a metropolitan area, the UNE “Fact” Report’s contention that wholesale loop and transport alternatives are necessarily available is false. In its submissions on the record in this proceeding, ALTS member company McLeodUSA states, “The mere fact that CLECs have fiber rings deployed within cities near commercial buildings ignores the fact that the last 100-500 feet from a fiber ring to an actual commercial building may be the most difficult and expensive to install, thereby rendering these fiber rings incapable of providing loop access to all but a very minute number of extremely large business customers.”³ XO echoes this reasoning that “[m]erely passing nearby a customer facility does not enable XO to actually provide service to the customer.”⁴ Therefore, carriers like XO and McLeodUSA cannot serve the millions of commercial office buildings in the cities where they have metro networks unless those buildings are physically connected to its fiber ring. Most CLECs report it is both time consuming and prohibitively costly to construct

² See, e.g., UNE “Fact” Report at III-13, III-15, and Table 9.

³ McLeodUSA Reply Comments at 10.

⁴ XO DS1 Loop Emergency Petition at 27.

building laterals even when the building is relatively close to the carrier's fiber ring.⁵ As such, these CLECs must use UNE loops to connect end users to those fiber rings.

Furthermore, the existence of an alternative fiber network does not ensure that the owner of that network provides extensive wholesale services over that network. The RBOCs would have the Commission believe that the existence of a network is sufficient proof of alternative wholesale facilities. Having a network in place is just the first step in providing services to wholesale customers. For example, despite KMC's extensive network throughout its region, the company has no ability to offer wholesale services and would incur significant costs to do so.⁶ The UNE "Fact" Report also claims that "the fact that competition is flourishing for [special access, large enterprise customers, and high-capacity data services] that rely on high-capacity facilities, proves that high-capacity alternatives are now competitively available on a wholesale basis wherever the demand for high-capacity facilities and services exists."⁷ There is no guarantee, however, of wholesale provisioning merely because there is retail competition. Many CLECs have developed their networks like KMC, whose network "was engineered and sized based on the KMC business model, which did not contemplate a wholesale transport or loop provisioning service."⁸ In describing competitive daisy-chaining, the RBOCs imply that competitive carriers interconnecting and sharing networks is as simple as connecting the dots between those networks,⁹ however, as KMC explains, significant redesign and upgrades are often necessary to provide wholesale services.

The RBOCs have also suggested that because the RBOCs themselves have undergone the transformation to become wholesale providers, CLECs could easily do the same and wholesale loop and transport facilities. Of course, the major difference between CLECs and RBOCs is that the RBOCs own nationwide, ubiquitous bottleneck facilities and CLECs do not. Despite limited network deployment, CLECs cannot, in the current capital environment, incur the expense of providing wholesale services. In some cases, carriers have done so because they have found it in their economic interest to include wholesale services in their business plan, but only to the limited extent described in the record. The Commission cannot assume that the mere existence of competitive fiber is sufficient to indicate non-impairment, because such fiber facilities are more likely used for long haul traffic, not last mile connectivity.

The UNE "Fact" Report further claims that "[m]any CLECs acknowledge that they now serve a significant percentage of their customers entirely over their own facilities" then cites just three carrier statements, two of which, MCI and AT&T, are long distance companies that serve the large enterprise market, not small/medium businesses, and thus have very different UNE needs.¹⁰ These three carriers hardly qualify as "many"

⁵ Loop and Transport Coalition Reply Comments at 37-8; XO DS1 Loop Emergency Petition at 27; KMC Declaration of Mike Duke, Director of Government Affairs, KMC Telecom Holdings, Inc., ¶¶ 16-17 (Oct. 1, 2004) ("Duke Decl.").

⁶ *Id.* at ¶ 16-25.

⁷ Report at III-2.

⁸ Duke Decl. at ¶ 17 (emphasis omitted).

⁹ Report at III-16-17.

¹⁰ *Id.* at III-3-4.

CLECs, and the statements of MCI and AT&T regarding 20-28% of their customers being served “on-net” hardly support the proposition that a significant percentage of customers of ALTS member companies are being served entirely over CLEC facilities. In contrast to this questionable assertion, ALTS members have presented evidence of their ongoing need for unbundled high-capacity loops and transport, specifically because they do not serve a significant percentage of customers entirely over their own facilities. The RBOCs further misconstrue data regarding services provided over CLEC facilities in Appendix D of the Report, noting that both the terms Operational and On-Net CLEC networks appear to involve the use of a CLEC’s own facilities.¹¹ While this may be true, the RBOCs appear to assume that CLEC services are provided entirely over the CLEC’s own facilities. In its reply comments, however, McLeodUSA clarified that it “has never limited use of the term ‘on-net’ to describe only end-to-end service offerings over 100% McLeodUSA network facilities.”¹² Rather, “[o]n net’ has always encompassed McLeodUSA’s use of local switching in combination with unbundled local loops leased from an RBOC.”¹³ Because these terms may be ambiguous, any use of the information in Appendix D (and similarly Tables III-7 and III-8 and III-9) must be placed in proper context and not used to support the RBOC claim that carriers are providing services exclusively over those networks without access to UNEs.

Relying on the information in Appendix D, the RBOCs claim that “competing providers had deployed at least one network in 140 of the top 150 MSAs, and an average of 19 networks in each of the top 50 MSAs.”¹⁴ However, there is no mystery to discovering that CLECs have deployed networks in the top 50 MSAs, for these are the markets where many businesses customers desiring high-capacity services are located. But the Report never defines what it means by “CLEC networks.” For example, the Report considers a facilities-based CLEC that has deployed its own switches – and thus has its own “network” – to also have deployed last mile loop and transport capabilities, which few CLECs have done. Nonetheless, the RBOCs claim use the phrase “CLEC network” loosely in the hopes that the Commission will conduct no real analysis of whether any alternative loop and transport facilities are actually available. The Report extrapolates further from its presumptions about MSA-wide data and attempts to draw broad conclusions from seemingly innocuous data in Tables III-7 and III-8. These tables include primarily marketing statements from companies regarding the services they offer; however, contrary to the RBOCs’ suggestion, the Commission must not assume that these services are (1) provided throughout each MSA where that carrier provides services, or (2) provided entirely over a competitive network without the use of UNEs. In fact, these tables merely state the obvious – that facilities-based competitive carriers use their networks to provide high-capacity and local services, respectively.

In sum, although the RBOCs boldly assert that “competing carriers are able to provide high-capacity loops without access to UNEs, wherever demand for high-capacity

¹¹ *Id.* at Appendix D.

¹² McLeodUSA Reply Comments at 10.

¹³ *Id.*

¹⁴ Report at III-3.

services exists,”¹⁵ the evidence presented by CLECs in this proceeding directly contradicts this claim. All of the general information presented in the UNE “Fact” Report about networks deployed within MSAs and types of service provided over CLEC facilities proves nothing in and of itself about whether a CLEC may be impaired without access to RBOC UNEs to serve a particular customer or building. The Commission must conduct a route-by-route analysis to determine if sufficient loop and transport alternatives exist for CLECs to serve their customers.

B. The RBOC MSA-wide data is largely irrelevant in the Commission’s route-by-route analysis.

Much of the deployment data in the Report is presented on an MSA-wide basis; however, neither the economics of self-deploying fiber networks nor the availability of third party alternative networks is determined on an MSA-wide basis. Rather, these determinations are made based on the actual location of those facilities and the customer to be served. Thus, merely because a carrier provides wholesale services somewhere in a MSA does not in any way guarantee that another carrier will be able to obtain the particular loop and transport services it needs to provide retail services to its current or future customers somewhere else within that MSA. And the RBOCs present no evidence that deployment of fiber in a particular area of an MSA equates to economic feasibility for that carrier or another to deploy fiber in another area of that MSA.

Notwithstanding the D.C. Circuit’s caution to the Commission to consider similarly-situated routes within an MSA, the court did not require the Commission to conduct its impairment analysis on an MSA-wide basis. In fact, the court agreed with the Commission’s rationale that deployment on one route “should not be *sufficient* to establish competition”¹⁶ on another route, but found that the Commission could not consider it irrelevant. Thus, the Commission may not “ignore facilities deployment along similar routes when assessing impairment,” but it need not make its determination based solely on this fact, as the RBOCs argue.¹⁷ The key factor in this analysis is determining which routes may be “similar” to those where deployment has occurred, which certainly necessitates the Commission conducting a route-by-route – not an MSA-wide – analysis. Therefore, the Commission must not draw conclusions based on the MSA-wide data presented by the RBOCs because it overstates the availability of both self-deployed and third-party wholesale networks.

The Report includes information regarding deployment of competitive networks and competitive services in particular areas and then extrapolates that such networks and services are available throughout the encompassing MSA. For most carriers, this is not the case because their serving areas do not typically coincide with MSAs. For example, ALTS member companies provide service within a network footprint of collocations, which is far less than the entire MSA. The RBOCs also imply that where fiber has been deployed, any capacity of services may be provided by that carrier, stating that

¹⁵ *Id.* at II-31.

¹⁶ *USTA I, I* slip op. at 29 (emphasis in original).

¹⁷ *Id.*

“[o]perators of competitive fiber networks now routinely offer high-capacity services over those networks, on a wholesale basis, from DS1 (1.54 Mbps) all the way up to OC-12 (622 Mbps) and above.”¹⁸ Table III-9 of the Report includes a list of such carriers and their marketing statements regarding their wholesale offerings. Putting aside the fact that the RBOC’s general proposition is false as discussed below, what is missing from this data compilation are the actual locations of those wholesale offerings. Merely having the capability to provide a certain capacity of service in one area does not equate to widespread deployment of that capacity throughout an MSA, nor does it mean that such widespread deployment is economically feasible or rational. Carriers may be able to provide wholesale services in areas where their networks are deployed but will not be able to provide those services in other areas without access to UNEs.

Furthermore, there should be no assumption that carriers providing wholesale services or retail services do so entirely over their own networks. For example, ALTS members Alpheus (formerly El Paso) and XO, who are listed on Table III-9 as providing wholesale high-capacity services, do not provide those services entirely over their own facilities. They purchase UNE dark fiber from the ILEC in order to provide wholesale services, thus if dark fiber becomes unavailable, these carriers will no longer be able to offer their wholesale services to other carriers. The Commission must not rely on the general carrier marketing statements compiled in the Report to determine where alternative wholesale facilities exist.

II. The Commission Must Not Rely Entirely on Intermodal Competition In Determining Whether Wireline Competitors Are Impaired Without Access to ILEC UNE Facilities.

A. Intermodal competition alone is not sufficient to justify eliminating significant UNE Access.

The RBOCs appear to conclude that the existence of *any* intermodal competition within a market is sufficient to eliminate much of their unbundling requirements. They tout the fact that “nintey percent of U.S. households can now obtain broadband services using facilities supplied by companies other than incumbent LECs,” but this statement relies entirely on cable modem providers that serve the residential market, not small/medium businesses.¹⁹ The RBOCs point to the D.C. Circuit’s discussion in *USTA II* regarding factors that the Commission must consider in determining impairment to support their proposition that a single intermodal competitor is sufficient.²⁰ Qwest and USTA even boldly argue that potential intermodal competition justifies eliminating unbundling, even where no intermodal facilities are deployed.²¹

¹⁸ Report at III-14.

¹⁹ Peter W. Huber, *et al.*, *UNE Fact Report 2004*, submitted by BellSouth, SBC, Qwest and Verizon (Oct. 4, 2005) at II-2 and Table II-1 (“Report”).

²⁰ See BellSouth Reply Comments at 27; Qwest Reply Comments at 15-16; USTA Reply Comments at 5-6.

²¹ Qwest Reply Comments at 16; USTA Reply Comments at 5-6.

The D.C. Circuit did not in any way suggest or require that the Commission remove unbundling obligations where only one viable intermodal competitor exists. The Court merely affirmed “that the Commission cannot ignore intermodal alternatives,” and indicated that the Commission may determine a reasonable amount of weight to grant this factor in its analysis.²² It would be unreasonable for the Commission to rely entirely on intermodal competition in determining whether intramodal competitors are unimpaired without access to UNEs. Rather, the Commission should consider the existence of intermodal competition in conjunction with its analysis of intramodal competition, and only where sufficient competition from both sources exists such that carriers have deployed adequate wholesale networks, then wireline carriers may be considered not impaired without access to UNEs.

Furthermore, the data on which the RBOCs rely shows that the only significant intermodal competition that the RBOCs face for either voice or data services is from cable modem operators. As discussed below, while cable operators may provide some competitive broadband services, they do not provide significant voice competition and they do not serve the small/medium business market. The existence of cable modem services alone does not signify lack of impairment for intramodal competitors. If the Commission eliminates UNE access for intramodal competitors, it would create a virtual duopoly for residential broadband services, and a monopoly for small/medium business broadband services, which would be harmful to competition and consumers.

The Commission has “been highly skeptical of mergers that would lead to a duopoly, and the courts have found that mergers to duopoly are generally unacceptable.”²³ The Commission has already dramatically reduced or in some cases eliminated CLEC access to fiber facilities used to provide competitive broadband services, thereby granting the ILECs opportunity to gain even greater market power for these services, which clearly conflicts with the Commission’s policy not to support monopolies in the marketplace. In this proceeding, the Commission must not further reduce CLEC access to UNE high-capacity loops and transport necessary to provide a variety of competitive services.

B. VoIP competition is irrelevant in this proceeding because does not provide stand-alone facilities-based competition.

The UNE “Fact” Report data reveals how little competition exists from circuit-switched telephony via a cable provider, stating that only 15 percent of all U.S. households are now able to obtain such service from their local cable company.²⁴ The Report further touts that “more than 15 percent [of those households] actually subscribe, [and] [i]n a number of markets, the penetration rate is much higher – as much as 45 to 55

²² *United States Telecom Association v. FCC*, 359 F.3d 554, ___ (2004) (*USTA II*), slip op. at 25.

²³ In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, Statement Of FCC Commissioner Michael J. Copps (Approving In Part, Dissenting In Part), FCC 04-255, at 2 (2004) (“Copps Statement”).

²⁴ Report at II-38-39.

percent.”²⁵ However, these figures highlight that generally only 2%, and in limited markets perhaps up to 8%, of all consumers have subscribed to cable circuit-switched voice services.²⁶ Again, the RBOCs would have the Commission rely on this paltry example of competition – applicable only to the residential broadband market, not the small/medium business broadband market -- to justify elimination of unbundling requirements.

The UNE “Fact” Report extensively discusses VoIP as an alternative to circuit-switched voice service, but the RBOCs acknowledge that VoIP services depends on the existence of a broadband connection.²⁷ Thus, while VoIP may provide an alternative to the ILEC circuit-switched retail voice service, it does not provide an alternative to the ILEC broadband services, or underlying ILEC bottleneck facilities, and in fact cements consumer dependence on a broadband connection. Without CLEC providers of competitive broadband services, consumers will be dependent on, at best, one of two duopoly providers – the ILEC or the cable modem provider.

Although a variety of VoIP services are now being offered by providers, it is still unknown the number of customers that will subscribe to these services because they must also subscribe to expensive broadband services. On the one hand, the Report concedes that “VoIP services are still at an early stage of development” while on the other, it claims that “[c]onsumers will switch to VoIP at an even faster rate when regulators stop diverting competition to UNE-based alternatives defined by artificially depressed TELRIC prices.”²⁸ The latter statement clearly reveals the RBOCs’ intention in this proceeding – eliminate UNE-based competition so that they can maintain their monopoly. The RBOCs would have the Commission completely abandon UNE-based competition despite their admission that VoIP is not a stand-alone service in competition with the RBOC’s retail services. Essentially, the RBOCs are seeking the Commission’s help to eliminate the only true facilities-based voice competition they face – that from facilities-based CLECs using UNEs to serve their customers.

Moreover, if the RBOCs are permitted to eliminate their CLEC competition, they are likely to then turn their attention to eliminating those carriers providing competitive VoIP services over the ILEC network. As Commissioner Copps discussed in his separate statement regarding the Cingular/AT&T Wireless merger, “as end-users of facilities-based carriers, VoIP competitors are beholden to the Bell and cable companies. We can cross our fingers and hope that growing duopoly does not discriminate so as to snuff out growing competition—but absent any commitment on the part of this Commission to insist on non-discrimination rules, I remain concerned for independent VoIP providers.”²⁹

C. Wireless competition is not a significant threat to ILEC wireline services.

²⁵ *Id.*

²⁶ These figures are calculated by multiplying the 15% of all households where cable circuit-switched voice service is available by the subscription rate in certain markets, 15% and 55% respectively.

²⁷ “These competitors sell voice service not as a bundle of switching and transport, but as a discrete service that runs on top of broadband data connections sold separately, in a competitive market.” Report at II-1

²⁸ *Id.* at II-4.

²⁹ Copps Statement at 3.

The Report attempts to argue that wireless competition provides a viable alternative to RBOC wireline services; however, the data itself belies that claim. The Report declares that “[a]t least 14 percent of U.S. consumers now use their wireless phone as their primary phone, and at least 7-8 percent have given up wireline service entirely.”³⁰ This is hardly compelling evidence that wireless competition poses a significant threat to the RBOC wireline monopoly. Furthermore, while analyzing the status of wireless-wireline intermodal competition during review of the proposed Cingular/AT&T Wireless merger, the Commission recently determined that “most wireline customers do not now consider wireless service to be a close substitute for their primary line obtained from a wireline carrier ... [because] there remain qualitative differences between wireless and wireline services.”³¹ The Commission further concluded that there was currently limited wireless-wireline competition, thus the merger would not significantly harm intermodal competition.³² As Commissioner Copps reasoned in his separate statement, “I guess this means we won’t be hearing so much rhetoric in the future about the power of wireless as an intermodal competitor.”³³ Because of the Commission’s recent analysis, it must disregard the overstated RBOC claims regarding wireless intermodal competition.

Furthermore, while the Report states that the Bell companies “have invested very heavily in their deregulated wireless affiliates,”³⁴ it minimizes the fact that the largest wireless carriers capable of providing intermodal competition are affiliates under the control of the RBOCs. The Commission recognized that rather than developing products designed to compete with wireline services, Cingular, under the direction of BellSouth and SBC, “developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services.”³⁵ The same could be said of Verizon Wireless. Those two carriers are the top two wireless carriers, and post-merger together will be more than 5 times larger than the next largest competitor.³⁶ Furthermore, the Commission admitted that “it appears that Cingular is unlikely to initiate its own wireless substitute offering post-acquisition in the SBC and BellSouth regions.”³⁷ As Commissioner Copps so aptly deduced, “[b]ecause Cingular and Verizon Wireless are the largest wireless carriers in their respective parents’ wireline

³⁰ Report at II-5.

³¹ *In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion and Order, FCC 04-255, ¶ 247 (2004) (“Cingular/AT&T Wireless Order”).

³² *Id.* ¶ 238.

³³ Copps Statement at 3.

³⁴ Report at I-16.

³⁵ Cingular/AT&T Wireless Order ¶ 244 (“Cingular has developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services. Cingular developed this strategy largely because SBC and BellSouth play a significant role in Cingular’s business decisions.”).

³⁶ Copps Statement at 3; Securities and Exchange Commission, “Carrier Subscribers and Capital Expenditures,” Second Quarter 2004.

³⁷ Cingular/AT&T Wireless Order ¶ 245.

regions, this means that many Americans can expect intermodal competition by wireless carriers to suffer from this merger.”³⁸

Therefore, even if wireless services provided significant intermodal competition, it would be through an alternate technology but not likely an alternate provider. While the RBOCs continue to control the largest wireless providers, they would continue to be monopoly providers of voice services since they own a significant percentage of the wireless facilities and reap a large portion of the wireless revenues. “Once Cingular acquires AT&T Wireless, more than half of all wireless customers will be controlled by the Bell companies for the first time ever. In many markets BOC control of wireless customers will be even higher.”³⁹ Thus, the Commission must not be swayed by the RBOCs misleading and self-serving claims about wireless intermodal competition in this proceeding.

Respectfully submitted,

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³⁸ Copps Statement at 3.

³⁹ *Id.*